***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

75 7349

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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| DONALD E. LEWIS, etc., Appellee, | Civ. 1973-396 |
| vs. | Appeal #75-7349 |
| LEWIS GENERAL TIRES, INC., et al., Appellants. | BRIEF OF APPELLEE |

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## OTHER AUTHORITY

## STATEMENT OF ISSUE

Whether or not a previously pending stockholder's derivative lawsuit stating a corporate cause of action alleging violations and breaches of the fiduciary and trust obligations by the individual defendants as directors and officers of the corporation must be stayed and referred to binding arbitration where there is stockholder's repurchase agreement which provides that "In the event of any dispute under this Agreement, such dispute shall be settled by arbitration..." and the involved stockholder's repurchase agreement does not mention nor contemplate coverage of such alleged corporate causes of action.

## STATEMENT OF CASE

Plaintiff filed his original stockholder's derivative action stating a corporate cause of action on August 6, 1973, in the Federal District Court located in Rochester, New York. (Record item 1). Plaintiff's stockholder's derivative lawsuit states a corporate cause of action alleging violations and breaches of the fiduciary and trust obligations by the individual defendants as directors and officers of the corporation. (Record item 1).

On October 24, 1973, defendants and intervenor - third party plaintiff moved the trial court for a stay and/or dismissal of the plaintiff's stockholder's derivative action on the basis of an arbitration clause in a stockholder's repurchase agreement. (Record item 5). On March 8, 1974, the trial court definitively denied defendants' and intervenor's - third party plaintiff's motion. (Record item 8).

Again, on March 10, 1975, defendants and intervenor-third party plaintiff moved the trial court for the same relief on the same ostensible grounds as was previously attempted by the motion on October 24, 1973. (Record item 13). Emphatically, the trial court again denied the second motion by defendants and intervenor - third party plaintiff, (Record item 15), from which the present appeal was taken. (Record item 16).

The involved stockholder's repurchase agreement provides in its Paragraph Eleven (11) that " In the event of any dispute under this Agreement, such dispute shall be settled by arbitration..." (Record item 13, Exhibit "B"). The same stockholder's repurchase agreement in its entirety fails to make provision whatsoever in covering the matters complained of in plaintiff's original stockholder's derivative action. (Record item 13, Exhibit "B").

## STATEMENT OF ARGUMENT

It is elementary that arbitration agreements are contractual in nature. Accordingly, the fact that the parties to an arbitration agreement have agreed to arbitrate controversies of a certain class or type does not require the referral to arbitration of entirely different disputes; that is, those disputes which are outside the scope of coverage of the arbitration agreement. See Universal American Corporation v. S.S. Hoegh Drake, 264 F. Supp. 747 (S.D.N.Y. 1966).

The present case is a shareholder's derivative action maintaining a corporate cause of action. Plaintiff, Defendants, and Intervenor have entered into a shareholder's repurchase agreement that provides solely for the arbitration of the repurchase

price should there be a dispute. That is the extent of the agreement's coverage. Paragraph Eleven (11) of the in question repurchase agreement states:

> ARBITRATION: in the event of any dispute under this Agreement, such dispute shall be settled by arbitration in Rochester, New York, in accordance with the rules then obtaining of the American Arbitration Association, and judgment upon the award may be entered in any court having jurisdiction. (Emphasis mine.)

Nowhere embodied within the terms of the parties' repurchase agreement is there any mention of the operative allegations and circumstances which form the basis Plaintiff's derivative complaint. Thus, there is no way that the aforesaid arbitration clause could rationally be said to be inclusive enough to stay the pending derivative action and refer this controversy to arbitration.

The case which is directly on point is Hotcaveg, etc. v. Lightman, et al., 211 N.Y.S. (2d) 533, 27 Misc. (2d) 573 (1961). Hotcaveg also was a shareholder's derivative action and the court in holding that the arbitration of the same was improper stated:

> the gravamen of the cause of action alleged is the claimed violation by the individual defendants of their fiduciary and trust obligations as directors and officers of the corporation in whose right the suit was brought. It can hardly be said that such violations constitute, in the language of the arbitration clause "Any dispute or disagreement among the parties with respect to any provisions of this agreement or its interpretation"... It is clear that the pre-incorporation agreement executed by the parties was intended to cover only the relationship among the stockholders, inter se. (at 211 N.Y.S. (2d) 534). (Emphasis mine.)

As in the present case, Hotcaveg involved reference to arbitration of only those matters covered in the agreement which contained the arbitration clause. And as in Hotcaveg, the pre-

sent case is a shareholder's derivative action predicated upon alleged violations of fiduciary obligations of the directors and officers of the corporation which failed to bring its corporate cause of action against the wrongdoers. It therefore must be concluded that this shareholder's derivative action is not referable to arbitration. See also generally, New York Digest (2d), Contracts Section 285 (2) and Matter of Diamond, 80 N.Y.S. (2d) 465 aff'd., 274 App. Div 762, 79 N.Y.S. (2d) 924 (1948).

Counsel for Defendants and Intervenor has misplaced his reliance on Siegel v. Ribak, 43 Misc. (2d) 7, 249 N.Y.S. (2d) 903 (1964) for the arbitration clause in Siegel stated:

> In the event that any dispute shall arise between the parties hereto, then such dispute shall be referred to arbitration as provided for herein. (at 249 N.Y.S. (2d) 905). (Emphasis mine).

It is readily apparent that the arbitration clause involved in Siegel was all-inclusive as to any disputes between the parties thereto, not just limited to the contract's provisions. And the present case is not the same as that in Siegel since the language here is limited to disputes involving the stock repurchase agreement. Compare, Crandall v. Master-Eagle Photoengraving Corporation, et al., 211 N.Y.A. (2d) 535 (1960) where the court clearly makes this distinction. Counsel for Defendants and Intervenor cites several other cases however, they are all inapplicable on the same basis since they are contractual breaches forming the basis of the arbitrability. See Karpinecz v. Marshall, 209 N.Y.S. (2d) 945 (1960).

Indeed on page three (3) of the movant's memorandum of facts it is stated:

> In accordance with the Agreement which was signed by all of the stockholders, Lewis General

> Tires, Inc. was obligated to purchase the stock of S.L. & E., Inc. for the book value, and payments had to be made by Lewis General Tires, Inc. to each selling donee stockholder, who was not then a stockholder of Lewis General Tires, Inc., and payments were to be made over a term of ten (10) years. (Record item 13).

Thus, even by the movant's own characterization of the scope of coverage of the stock repurchase agreement which contains the limited arbitration clause, there is absolutely no basis for imagining that Plaintiff's shareholder derivative action is a proper matter for arbitration pursuant to this agreement.

Counsel for Defendants and Intervenor spends several pages discussing the validity and enforceability of arbitration clauses in contracts. However, Plaintiff agrees that under federal or state law arbitration clauses are generally valid and enforceable. Unfortunately, this proposition of law has nothing to do with the issue at hand.

The opposition's merit brief continues to be bewildering by discussing arbitrability vis'-a-vis' federal securities law. Applicability of this discussion to the case at hand defies comprehension.

Moreover, the opposition has apparently misconstrued the function of the summary judgment procedural mechanism by which this motion was taken. Although the opposition ostensibly had made a motion for summary judgment, pursuant to Rule 56, Federal Rules of Civil Procedure; not once does opposing counsel set forth a factual basis to support the controlling issue stated in Rule 56 (c), "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

To exacerbate the frivolity of this motion, the same relief had been previously requested in this case by the opposition's motion filed on October 24, 1973. And on March 6, 1974, this Court unequivocally denied the same request now made again.

CONCLUSION

For the foregoing compelling facts and applicable law, appellants' appeal must be denied and the previous orders of the trial court be affirmed and that this litigation proceed to trial in the Federal District Court located in Rochester, New York.

Respectfully submitted,

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S E R V I C E

A true and correct copy of the within Appellee's Brief has been mailed this 11th day of November, 1975 to Charles B. Kenning, Esq., Attorney for Appellants at 1008 Times Square Building, 45 Exchange Street, Rochester New York 14614.

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